REPORTS □ 10

THE EVOLVING URBAN LAND TENURE SYSTEM IN CANADA

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1.0 INTRODUCTION

During the past two decades, rights of land (property) ownership in Canada have undergone significant revisions through provincial legislation, public policies and market practices. For example, agricultural land owners have been restricted, to varying degrees, from selling lands to non-residents or non-farmers in five provinces. Tenurial redefinitions of a greater scope have evolved with the introduction of condominiums and now Time-Sharing units as the title bearing real property. As a result of such measures and practices, not only the boundary between public and private spheres in property rights have become more diffused, but also a high degree of fluidity has come to characterize the "powers" normally associated with land ownership. The emerging situation can be described as a "quiet revolution" in land tenure, borrowing an American term of slightly different meaning. A realignment of rights and obligations of land ownership is taking place in a piecemeal and incremental way.

The general sweep of the change is partially obscured by the fact that public discussions have been dominated by ideological themes. Most of the discussions about property rights and land tenure quickly turn into debates about the desirability of greater public control versus market freedom. While the contemporary urban land tenure cannot be reduced merely to the question of who exercises rights of ownership, namely community or individual, the basic issue now is the question of how and for what ends the proprietary powers are deployed. This is because of the unusual "nature" of urban land.

A piece of urban land is the product of a complex system of interrelated factors. A city lot is uninhabitable, and thus non-existent, unless it has access to a street and a connection into the drainage network, and is governed by rules of good neighbourly behaviour as well as the means to enforce them. A variety of public goods are prerequisites for the fulfilment

of private property rights, so much so that for every acre of house lots almost an acre of land has to be committed to streets, roads, parks, schools, and other public utilities.[1] The public and private domains are complementary and, in post-industrial societies, they become all the more intertwined.

1.1 The Issue

The tenurial issue that has come to the forefront in contemporary times pertains to the use of land resources and the extent to which the overall pattern of land use promotes individual as well as collective welfare. Are property rights being exercised to maintain irreplaceable agricultural lands? Is land being subdivided efficiently from the point of view of public economy? Does a household have a right to stay put? Are the institutional arrangements appropriate for effectively and equitably dealing with these issues? These are the tenurial issues in contemporary urban Canada.

The social agenda that has prompted various revisions of tenurial arrangements in Canada is evident from the reluctance, even, of the Conservative governments of Alberta, Saskatchewan, P.E.I. and Newfoundland to support the entrenchment of property rights in the Canadian Charter of Rights and Freedoms. These provinces are apprehensive about the fate of their programs to preserve agricultural lands and to protect natural resources. Their opposition to entrenchment indicates the ambiguity that has come to characterize customary notions of property rights. It also suggests that even for Conservatives the tenurial question is more than a matter of public versus private powers.

This report is an inquiry into the emerging land tenurial trends in Canada, particularly in urban settings. It is an exploration of the ways in which property rights are being revised since the late 1960s under public

as well as private initiatives. The report also examines the logical implications of such revisions. It is not an exercise in legal research or quantitative analysis. It is a theoretical interpretation of the modifications and revisions introduced in the rights associated with land ownership since 1970. The first step in this inquiry is to define terms and concepts that are the tools of analysis.

2.0 LAND TENURE AND PROPERTY RIGHTS

First, the term "land" needs to be explained. Land refers to a three-dimensional piece of the earth's surface assumed to be extending from the centre of the earth to the sky, but factually limited to the usable and controllable part of the ground and atmosphere. What is more noteworthy is the fact that the term land normally includes "all things permanently affixed to it" including improvements such as buildings, fences, trees, etc. Thus the term land is used as a synonym of the real property. Barlowe defines it as "the sum total of the natural and man-made resources over which possession of the earth's surface gives control."[2]

Land tenure is a system of legal or customary rights and obligations by which people "control, occupy and use landed property."[3] It is also a system of norms and practices regulating relationships among owner, users and community at large. Land tenure systems can be initially classified by the criterion of ownership, namely individual versus communal, and can be further differentiated on the basis of the type of ownership rights, i.e. absolute versus derivative.[4] Property rights are normative elements of a land tenure system defining powers of owners and delineating the domain of their control.

The land tenure system underlies the production as well as distribution processes of an economy. The land owners, and how they deploy this factor, determine what foods and services will be produced. Correspondingly, the

returns from the production are distributed among land owners and labour according to the rules enshrined in the land tenure system. Thus, the property relations inherent in a land tenure system are a determinant of the growth and welfare of a society. So widely recognized is this relationship that the World Bank favours land reforms as an element of agricultural development efforts for Third World countries. Generally, the thrust of the proposed reforms is to reduce absentee ownership and to promote more equitable distribution of land.

The inequities of farm land ownership in the Third World may appear to have little relevance to urban situations of North America, but the recurring issue of land monopolies and absentee owners, windfall gains, and sub-optimal uses suggest that the main thrust of any urban land reforms will also have to be concerned with the powers of land owners and the structure of decision-making. For example, Geisler and Popper maintain the American land reform groups "seek more influence over the ownership, use, and regulation of land. They justify their claims in terms of social equity, economic efficiency, community control and the quality of local life."[5]

Undoubtedly the measures required to deal with the tenurial issues in North American cities have to be different. A physical redistribution of land holdings may not be appropriate. Instead the urban land reforms proceed incrementally by redefining rights and obligations of owners, the community, investors and users. The logic of land reform in North America resides "in the area of land-use planning and redistribution of control rather than in the redistribution of ownership."[6] And this is the domain of property rights.

Property is a man-made institution which defines relationships between people and objects. Property is not a thing, but it resides in an individual or community's powers to act or not act in relation to things. Ultimately property is a "bundle of rights" conferred upon the owner or possessor of an

object (e.g. land and buildings which are called real property) by custom, convention, assumption, edict or legislation. The notion that the property is a bundle of rights is all the more relevant in the case of land, which cannot be physically destroyed, consumed or carried away. These characteristics make land a unique object as it outlasts every owner. Effectively land ownership means having powers (conferred by property rights) to act in relation to land in certain ways for a lifetime. The "bundle" of rights does not have fixed contents. The nature and number of rights in a bundle vary from country to country and from one era to another. Denman maintains that the bundle is nothing more than a construct of separate rights and the property exists as long as there are any rights.[7] Thus, we cannot talk of the bundle but only of a bundle of property rights. This statement raises the question of the specific bundle that constitutes property rights in Canada.

3.0 PROPERTY RIGHTS IN CANADA

Canada has inherited two divergent legal traditions. Its French heritage, shaped by the civil code, regards property to be only the "rights of owning tangible objects," whereas the English common law extends it to the "ownership of rights." Obviously the distinction between the two lies in the nature of the object owned -- one recognizes only the tangible things and the other includes intangible objects (patents, copyrights, etc.) in property. Leaving aside the question of the nature of the object, there is substantial agreement between the two traditions about the "bundle of rights" as the basis of property. Kurse, a Danish professor, analyzed English common law and continental codes to identify common rights of property.[8] From his study the following powers can be deduced as the constituent elements of the bundle of property rights:[9]

a) power to use;
b) power to alienate;
c) power to assimilate;

d) power to pass - by succession;
e) power to claim title to.

The powers of ownership are often synonymous with "private" property rights. For example, Oosterhoff, in a report published by the Ontario Real Estate Association, lists rights of possession, exclusion, disposition, use, enjoying fruits and profits, and destroying or injuring, as the broad categories of property rights.[10] These are largely powers of ownership and not the full complement of property rights. This report's focus is primarily with the ownership rights, which are the focal point of the tenure system. The implications of the recent measures, both public and private, which have redefined the meaning and scope of these rights (or powers) will be analyzed.

The property rights can be packaged in different bundles. This is how "Interests" are carved out, and this subject is the concern of the land law.[11] Interests are enforceable rights of varying powers in land. They are proprietary interests as well as interests which take the form of "placing restrictions on somebody's land in your favour,"[12] (e.g. right of way, easement). Estates are packaged interests. Often the two terms are used synonymously, though terms describing estates are more generally known than interests, e.g. tenancy in common, leasehold, etc. Estates are constituted by interests (rights) carved along two dimensions,i.e. (i) time, indicating the duration for which the holder of the interest would have the right of exclusive possession, and (ii) usability, i.e. the kind of use permitted or restricted upon the land. Predominant forms of estates can be cross-tabulated by these two characteristics, as in Chart 1.

CHART 1

Types of Estates

		Time	
		Definite	Indefinite
Usability	(largely) Unrestricted	Leaseholds	Fee Simple
	Restricted	Trust	Easement
		Licence	Right of Way

In Canada the fee simple estate offers the greatest interest anyone can own in land. "It comes closest to the idea of complete ownership in English law."[13] Other forms of ownership, such as life estates, leaseholds, joint tenancy or tenancy in common, etc., confer rights that are restricted either in time or in powers and scope. The Canadian land tenure system has been conventionally examined in terms of the estates. On this score, there has been little innovation, whereas the main thrust of recent tenurial changes with which we are concerned has been in the scope, not the time or usability, of rights incorporated in various estates. The dimension of scope and power is the one most affected by recent changes.

4.0 CANADIAN URBAN LAND TENURE: A BENCH MARK

4.1 The Legislative Framework

In examining recent tenurial changes, it is necessary to delineate the prior situation or the baseline in reference to which the changes will be

observed. This section will present a picture of the urban land tenure in Canada as it purportedly prevailed before 1970. The year 1970 has been selected as the watershed because it marks the beginning of an era of "environmental consciousness" and "conservation ethics" which prompted new measures that have effected the bundle of rights in land. It must be viewed as a convenient reference point in an ongoing process of tenurial evolution and not be regarded as a precise date when some particular changes were precipitated.

Another point that should be clarified before proceeding with the description is the question of the uniformity of Canadian urban tenure. Is there one land tenure system or many? The simple answer to this question is that there are numerous mutations of a common Canadian specie. When considering the concrete and observable tenurial system, a diversity of forms is found by provinces. Whereas, if the underlying structures were focused upon, then the existence of a largely singular Canadian system is evident. There is a Canadian land tenure model which, though deducible from provincial systems, is hard to find in the pure form anywhere. This diversity of forms expressing a common structure is to be expected as Canada is a constitutional confederation and matters of land ownership, title, registration, property taxation, etc., fall under provincial jurisdiciton.

The Canadian constitution originated from the British North America (BNA) Act of 1867, whose section 92 gives provincial legislatures the exclusive authority over municipal institutions for the use, taxation and expropriation of land and other matters bearing on property rights. Furthermore, British common law is the received legal tradition of English Canada, while French Canada have evolved their own personalities independent of their ancestral systems. Even in colonial times many provisions of the common law or French civil code were not adopted in Canada, and numerous indigenous laws were enacted to deal with new situations. Also the American ideas and conventions have affected Canadian legal theory and practice. The American

influence is evident in matters of land and property issues. The two countries share many historical experiences such as the survey, settlement and registration of land, treatment of native land claims and aboriginal rights, and development of natural resources. Yet the Canadian land tenure system is distinguishable from each of the three constituent traditions, namely English, French and American.

The Crown, represented by provincial legislatures, defines the powers and procedures for registration, enjoyment, disposition and use of land. Ultimately the Crown is the arbiter of land rights. It is to the Crown that a title reverses with escheat or forfeiture, and it is usually a grant from the Crown that starts the line of a private title. In theory the property rights are endowed by the Crown, and they can be legislatively added, subtracted or modified subject to the restraints of due process, equity and natural justice. The fact that the fountainhead of the bundle of rights in land is the legislation enacted by provincial legislatures has a more than symbolic value. It means that public regulations which define the tenurial framework can be modified through legislative authority without being subjected to the judicial test of the legitimacy of police powers, as is the case in the United States.

Canadian commentators often point out that the authority behind land use regulations in Canada emanates from the powers of the Crown and the legislature, rather than from the doctrine of the state's police powers.[14] And it is maintained that this difference in authority behind zoning and planning controls fundamentally affects the public role in the use of land. Land tenure in Canada is much more a creation of public acts, and thus subject to legislative amendments.

4.2 Evolution of the Post-War Urban Land Tenure

By 1970 the Canadian urban land tenure system had fully crystallized in its contemporary form. All provinces had established public institutions

to control the use of land, and to guide expansion and redevelopment of cities. The provincial planning acts institutionalized the public interest and established the framework within which ownership rights could be exercised. By the end of the 1960s, public planning and regulatory machinery had been established in all provinces, encompassing most of the inhabited parts of Canada. The Master Plan, the zoning by-law and subdivision control legislation, became the three main instruments of land planning. An extensive decision-making apparatus consisting of local councils, planning committees, provincial appeal boards and professional bureaucracies was put in place to implement the public planning objective. These measures fundamentally revised the notion of land ownership, and introduced the public bodies as approving authorities for the use, division and assimilation of land.

With the institutionalization of urban planning in Canada, an owner's right to use became the power to install prescribed or approved (through re-zoning appeal) uses on land. The complex planning machinery set up to prescribe or approve the use or subdivision of land is meant to ensure that such decisions are fair, conforming to community objectives, and non-arbitrary. The actors representing the public are subject to procedural checks and balances, and restrained by legislative as well as planning requirements.

The foregoing description may have left an erroneous impression that before the institution of comprehensive planning, the right to use or subdivide and even profit from land was completely unrestricted, and an owner was free to do what he wanted on his own land. That is far from the truth. Almost nowhere in human societies is there an example of an owner being entitled to do whatever his whim or desire commands. Not to speak of Greek or Roman restrictions on property, common law has statutes dating back to the thirteenth century restricting certain uses of land as being nuisance, and reserving rights of way in private lands. The land titles in Canada always reserved the Crown's prerogatives. An owner's bundle of rights

originated from the patent under which the land was granted, and hence was subject to conditions prescribed or implied in it. Minerals under the ground were often excluded from a title granted by the Crown. Riparian rights in water flowing through a grantee's property, or hunting over and taking of wildlife from a title holder's land are common examples of the public domain in property rights.

In one sense, all Canadian cities began as new towns. They were laid out in accordance with some preconceived design -- checkered or grin-iron -- and the lots were sold or leased, often for prescribed uses. In cases where urban land was developed and distributed by railroad or mining companies, there were numerous reservations and conditions attached to the title. Also the fire and building codes were instituted early in urban settlement. By the beginning of the twentieth century, public regulations about lot coverage (Winnipeg's Tenement By-Law - 1910 - and provincial legislation authorizing the preparation of town planning schemes - Alberta and New Brunswick's Town Planning Act, 1912-13) were introduced, which ushered in the era of institutionalized city planning.

The purpose in citing these examples is to dispel any impression that the evolutionary changes in the rights to use, divide and assimilate land in the post-World War II period represented new restrictions on ownership rights. They were threshold changes along an evolutionary path which can be traced back to antiquity. Tracing the history of the planning and law is not necessary here. It is important to understand, however, that the public domain in the bundle of property rights has steadily expanded out of the exigencies of modern urban life, but it has a long history.

What distinguishes the post-World War II period in matters of land tenure is the institutionalization of public interest in the exercise of powers inherent in property rights, and the comprehensiveness of the public role in these matters. The public always reserved rights and obligations in

privately held property. Some of the earlier Crown's reservations, though now archaic and irrelevant, constituted substantive public presence in private property, such as the reservation to the Crown of all white pine trees on granted land in Ontario. Furthermore, it is not even the scope of public restrictions and reservations that is new in the post-World War II era.[15] It is the comprehensiveness of public regulations and their enforcement through a vast network of public bodies that distinguishes the post-war era. The Uthwatt Commission report in Britain, and the British Town Planning Act (1947), broke new ground in defining the public domain in land rights. The British initiative inspired Canada and, within a span of about ten years, almost all provinces enacted Town Planning Acts.[16]

Zoning was devised as the primary tool for implementing Master Plans. It prescribed the use and density and bulk (of building) for almost every piece of land in Canadian cities. The public authority to zone fundamentally revised an owner's power to use his land. It may be noted that Canadian legislation followed a middle course between the American and British planning practices in this regard. Canada adopted American style statutory zoning prescribing detailed land uses which an owner had the right to follow. Yet Canadian legislation precluded judicial reviews of zoning issues on the grounds of taking or inappropriate application of police powers as is the case in the U.S.A. Canadian zoning is less adjudicable than American, but it is more statutory and has more formal appeal than the British planning permission, which is essentially a matter of administrative discretion.

The revision of rights to use, divide, and assimilate land in the post-war period have been described at length, but other elements of the bundle of rights were equally affected in this era. In urban areas, location is the determinant of the use, which in turn determines the value of a piece of land. So the prescription of the use cannot but have an effect on the profitability of a piece of land. But the right to profit from land is also affected by property and capital gains taxes and service levies. The local capital works programs affect the potential for use, and thus the value and

profitability. Municipal financial management determines the property tax and other levies, which in turn affect the right to profit. It may also be pointed out that public bodies are not the only new actors in the process of making decisions about land. The introduction of mortgages and insurance has added a layer of private corporate actors in the disposition of urban land.

By 1970 Canadian urban land tenure had been modernized in that public and private interests in property rights were realigned. The realignment was largely a matter of formalizing public responsibilities. The emerging land tenure meant a conjunction of responsibilities in matters of land disposition. Whether it was the power to use, divide, assimilate or profit from land, the restructuring laid a statutory framework which prescribed the owner's fields of action. The property powers came to be exercised in the corporate mode, and not through traditional individual actions.

Though these changes appeared to restrict private property rights, it has been argued that by enhancing the welfare of the whole community an individual's benefits are also being increased. Dunham argues that "it is more important for private property that an owner have a set of expectations on which he can act than he be permitted to any particular thing."[17] By 1970 almost every urban lot in Canada was subject to public controls regarding use, siting of buildings, utility easements, density and building bulk controls, etc. Legally the restrictions had been legitimate, and politically they had proven to be acceptable to the Canadian public. This is the benchmark against which the new changes of the post-1970 era will be assessed.

5.0 CONSERVATION ETHOS AND URBAN LAND QUESTION

The post-war restructuring of urban land tenure through planning acts and municipal reforms is a new situation. But what was new for the 1950s

and 1960s became the established order for the 1970s. Therefore, the measures taken in the 1970s can now be labelled new by reference to the order established after World War II.

During the last one and one-half decades, Canadian public perceptions and social values regarding the use of land and other natural resources have undergone a significant change. A new public consciousness about the limits of growth and finiteness of natural resources has arisen in the country. There is a greater awareness of how important the appropriate disposition of land is for a community's social and economic well-being which the Science Council of Canada maintains has fostered a realization that "important social and environmental goals require more specific controls on the use that may be made of scarce land resources."[18] For the U.S.A. this ethos is more forcefully articulated by the Task Force on Land Use and Urban Growth which contends that "a new mood has emerged ...[which] appears to be a part of a rising emphasis on human values, on the preservation of natural and cultural characteristics that make for a humanly satisfying living environment."[19]

The conservation ethos has found expression in numerous ways: in the provincial measures to preserve agricultural lands; in attempts to maintain community viability through restrictions on non-resident land ownership; and, in environmental legislation. These changes represent another stage in the evolution of modern urban land tenure since World War II.

As is usual with public moods, the conserver sentiment has also given way to more pressing concerns. It has been swamped by the economic recession of the late 1970s which brought the bread and butter issues to the fore. Many public policies enthusiastically instituted in the mid 1970s are being re-examined. The Governments of British Columbia, Alberta and Saskatchewan have relaxed some of the more stringent regulations. These are the twists and turns along the path of evolving public attitudes, but the secular trend

in this evolution is towards greater social responsiveness in the use of natural resources. At this juncture we may ask what were the public concerns relating to land in the 1970s, and what actions did they prompt?

6.0 THE URBAN LAND ISSUES OF THE 1970s AND THE "NEW" MEASURES

It should be reiterated that 1970 is significant only for the convenience of analysis. Many of the issues of the 1970s and early 1980s can be traced back to earlier dates. They were accentuated in this period due to the particular combination of circumstances and changing social expectations. A case in point is the issue of high land prices.

6.1 High Land Prices

From 1966 the prices of urban lots began to rise, and by 1972 the rate of increase accelerated to the point that land prices rose by almost 25-30 per cent per year. The 1972-75 period has been called the real estate boom cycle by the Federal-Provincial Task Force.[20] On average, in 25 urban areas of Canada the price per foot frontage of serviced lots rose by 40.5 per cent in real terms and 85.5 per cent in nominal dollars.[21] The high price of urban land was the immediate public concern when the decade of the seventies began. Although the prices have continued to rise after the boom, their rate of increase has moderated. By 1980 the high mortgage rates had made homeownership beyond the reach of most young Canadians, thus submerging the issue of high land prices.

6.2 Corporate Oligopolies and Concentration of Land Ownership

The search for the causes of high lot prices in the 1970s brought forth the preposition that the developable land in Canadian urban areas was owned by a few corporations.[22] This issue came to a head with the Spurr report, and had begun to be defused by the time the Federal/Provincial Task Force

(1978) concluded that developer-monopoly was not the cause of high lot prices.[23] Regardless of the question as to how the corporate oligopoly affects land prices, absentee land ownership historically has been viewed with suspicion in Canada.

By the early 1980s, the land development industry was undergoing structural changes as a result of economic recession and demographic shifts. High interest rates made holding of land such a financial burden that large corporations were disposing of their land banks. Some got out of the residential land development business. Thus, economic vicissitudes and industrial reorganization have dampened the significance of ownership concentration as a public issue in the 1980s.

When this issue was high on the public agenda, the federal as well as provincial governments responded by instituting public land assembly programs and by regionalizing land markets. In 1973 the federal government through CMHC established a fund for assisting provinces in assembling land for urban development. Alberta, Saskatchewan and Ontario followed the federal lead by instituting land banks of their own. Also, tax disincentives for land hoarding were tried, e.g. Ontario's land speculation tax (1974).

6.3 Land Supply and Complexity of Public Controls

Intertwined with the issue of high land prices and oligopolies is the question of shortfalls in the supply of serviced urban land. At the height of the real estate price boom (1972-75), this issue was debated fervently in public forums. Two opposing positions were taken on this score. One attributed the shortages to corporate monopolies and the other referred to the high service standards (goldplating) set by municipalities and the delays caused by myriad public approval bodies in processing land development applications. Both these positions were passionately argued by their protagonists, though the Federal/Provincial task force found them equally unsustainable on empirical grounds.

The question of serviced land shortage arising from the delay, complexity and uncertainty of getting public approvals, as well as of the high costs of services, has continued to simmer throughout the 1970s and 1980s. For example, the Ontario Advisory Task Force on Housing Policy (1973) observed that on the average a subdivision plan had to be circulated among 38 provincial and 20 local public agencies for approval.[24] Subsequently the committee to review the Ontario Planning Act (1978), taking note of this issue, recommended that "the minister should establish by regulation the public agencies that are to be consulted in the consideration of subdivision plans, and deadlines for the receipt of comments from these agencies"[25] (emphasis added). This recommendation implicitly acknowledges the need for defining the scope of reviews to be undertaken by various agencies, and putting time limits on various stages of the process.

Ontario's example typifies the response of most provinces to the issue of public controls constraining land supply. Generally the review procedures have been streamlined and the approving authority has been decentralized. Such measures constitute the bases of the new planning acts enacted by provinces during the late 1970s (see Chart 2).

The result has been a general retreat from the regionalization of planning and servicing functions and reinforcement of the local authority. The province of British Columbia has gone so far as to disinvest the regional districts of planning and review powers.

6.4 Loss of Agricultural Land

Initially it may appear ironic that Canada, the second largest country in the world (area 9.9 million sq. km.), supporting only 25 million people, should be concerned about the shortages of agricultural land. But this is the issue that has prompted the most far-reaching extensions of public powers in recent times. The public concern about the loss of good quality agricultural land is well founded. The Canadian dilemma is illustrated by the

CHART 2

Environmental and Planning Legislations of the 1970s

Province	Environmental Acts	Planning Acts
Newfoundland	An act creating the Dept. of Provincial Affairs and Environment (1973) The Environment Assessment Act (1980)	Urban and Rural Planning Act (1970)
P.E.I.	The Environment Protection Act (1975)	The Planning Act (1974)
New Brunswick	The Clean Environment Act (1971)	Community Planning Act (1973)
Nova Scotia	The Act Respecting the Protection of the Environment (1973)	The Planning Act (1983)
Quebec	Environmental Quality Act (1972)	Land Use Planning and Development Act (1979)
Ontario	Environmental Protection Act (1971) (1975)	The Planning Act (1983)
Manitoba	The Clean Environment Act (1971)	The Planning Act (1975)
Saskatchewan	The Environmental Assessment Act (1980)	The Urban and Rural Policy and Development Act (1978)
Alberta	The Environment Protection Act (1970) Revised as the Environmental Control Act (1977)	The Planning Act (1977)
British Columbia	Environment and Land Use Act (1979)	Municipal Act, Part 21, Community Planning Sections (1979)

fact that only 0.5 per cent of the country's land area (4.19 milli ha) falls in the Class I category, which represents soils with no significant limitations for agriculture, and over 50 per cent of such lands are to be found in Southern Ontario, which is the most urbanized part of the country.[26] Similarly, in Alberta, British Columbia and Quebec, agroclimatically (soil quality combined with temperature and precipitation criteria) good quality farm lands are in the vicinity of major cities.[27] Thus the loss of agricultural land is a symptom of the difficulties encountered in channelling urban expansion. It is a manifestation of the non-farming uses outbidding the agriculture in the exurban land markets. The "loss" of good farm land occurs not only through the actual acreage used for urban purposes, but also for the urban shadow which extends far out into the countryside. Although the public debate about the extent of the loss is far from settled, the proliferation of provincial legislations aiming to preserve agricultural lands signifies the depth of public commitment.

In 1973, Newfoundland established a zone around the city of St. John's within which a piece of agricultural land could not be developed without the permission of the Minister of Agriculture. On the other side of the country, the B.C. Land Commission Act (1973), by establishing Agricultural Land Reserves (ALR), created agricultural zones within which other uses could only be developed with the express permission of the Commission. Ontario's Ministry of Agriculture developed Food Land Guidelines (1977) spelling out standards for allowing non-farm uses in the vicinity of active farms. Ontario also tightened the procedures and raised the standards for approving severances which are the main source of residential lot supply in rural areas.

By its Bill 90 (1978), Quebec instituted a system of designating agricultural zones in municipalities and regions. The sale of a part of a farm in a designated zone, removal of topsoil or use of sugarbush for any other purpose was required to be approved by the Commission de protection du territoire agricole du Québec.

Alberta, Saskatchewan, Manitoba and P.E.I. restructured land tenure in order to maintain farm viability and to keep agricultural land in the hands of local farmers. Through the Foreign Ownership of Land (1977) regulations, Alberta restricted non-Canadians to owning no more than 8 ha of land. Saskatchewan Farm Ownership Act (1974) limited non-residents (persons as well as corporations) to a maximum land holding of a quarter section (65 ha). The province had already established a Land Bank (1972) to buy land from retiring farmers in order to lease or sell to young farmers. Manitoba's Agricultural Lands Protection Act (1977) stipulated that "non-residents may own no more than 8 hectares of land" if acquired after April 1977. The Real Property Act (1972) of P.E.I. required non-residents who wanted to purchase more than 4 ha of land or 330 feet of shorefrontage (1974 amendment) to obtain permission from the Land Use Commission. This measure was meant to isolate P.E.I.'s land markets from the ex-territorial investment.

Only the basic legislation enacted in various provinces has been listed. Undoubtedly these legislations were often circumvented and they have been amended periodically. Tracing the history and assessing the effectiveness of these measures are not crucial to this report. From the tenurial perspective, the significant fact is that these measures projected the public interest into the question of who can own land, and how much?

6.5 Foreign (Non-Resident) Ownership

The question of the nationality, race (in earlier times) and origin of land owners runs through Canadian history.[28] It was reflected in populist outrage against land grants of the Hudson's Bay Company or the CPR. It lay behind the Métis uprising in Manitoba, or tenants' agitation in Ontario. A foreign or non-resident owner is an absentee land holder who profits from the labour of local residents. He has different investment priorities and is not likely to be responsive to local values. The main advantage of foreign investment in land is that external resources flow into a local economy.

Weighing against this advantage is the possibility of sub-optimal use of land and of unresponsiveness to local priorities.[29] As Gaffney says, the issue of foreign ownership is "one of land use, not foreign purchase."[30]

In P.E.I. by 1971 about 5.1 per cent (72,000 acres) of good quality agricultural land was held by non-residents (Canadians as well as Americans), and it was estimated that by the year 2000 almost half of the island "would belong to non-residents."[31] There was a strong sentiment against non-resident owners, as islanders felt blocked from access to beaches, and farm land prices rose to disinherit young farmers. The stereotype of a New York or Toronto banker using prime land as a summer retreat fuelled P.E.I.'s restrictions against non-resident owners. Similar popular sentiments impelled Alberta and Saskatchewan and, to a lesser degree, Ontario to tighten opportunities of non-residents buying land. Although explicit measures have been taken to restrict foreign ownership of farm lands, similar sentiments arise in urban areas if off-shore demands raise the housing prices and lead to rent increases.

The public measures to discourage foreign ownership have been discussed in the preceding section. This issue extends public powers to prescribe who is eligible to buy land. It restricts the right to sell and profit.

6.6 Environmental Protection and Energy Conservation

The decade of the 1970s will be remembered as the time of rediscovering environmental limitations. The depletion of the ozone layer in the upper atmosphere, the chemical cesspool that the Great Lakes have become, and the threat of nuclear contamination have aroused doubts about modern technology and human progress. Attitudes towards the natural environment have changed. There is a new awareness about the finiteness of air, water and land resources. These attitudes and perceptions were formally articulated at the World Environment Conference (1972). Canadian public consciousness about the need

to protect the environment arose in parallel with the international sentiment.

The federal government provided leadership by establishing the Environmental Assessment and Review Process in 1973, which was meant to assess the impact of federal projects on physical and social environments. The Federal Environmental Assessment Review Office (FEARO) was set up to oversee the review process. Provinces followed the federal initiatives. Alberta was the first to enact the Environment Protection Act (1970) (see Chart 2). Ontario's Environmental Assessment Act (1975) requires environmental assessment of projects undertaken by provincial and local agencies, and of private projects specifically designated for such a review. Although Quebec legislated an Environmental Quality Act in 1972, only in 1978 was it amended to establish comprehensive procedures for requiring environmental impact assessments. British Columbia has approximately 45 separate statutes referring to some aspects of environmental and social impacts, but the Environment and Land Act (1979) and Environment Management Act (1981) are the two pivotal legislations for environmental protection meant "to minimize and prevent the despoiling of the environment occasioned by resource and land development."[32]

These acts envisage two distinct levels of public action. First, they require that designated projects should undergo Environmental Impact Assessment. Second, they empower provincial ministries to institute area-wide environmental protection plans to regulate all development in a designated area. British Columbia has two such environmental protection areas, namely the Fraser River Estuary and the Cowichan River Estuary. Alberta designated eight Restricted Development Areas (RDA), five of which are in urban settings. Ontario's Niagara Escarpment Commission is another area-wide development control agency whose primary objective is to protect an environmentally critical area.

While environmentalism was seeping into public consciousness, the oil

crisis of 1973 brought home the vulnerability of energy shortages. So "Energy Conservation" became the rallying cry on conference circuits by the mid 1970s. Public forums were saturated with reports, forecasts and books about the impending energy shortages. Public consciousness triggered provincial actions. Energy conservation as a public objective was absorbed into existing environmental and land use regulatory instititions. Provincial planning ministries issued guidelines for energy efficient subdivisions and sponsored demonstration projects of solar homes. Energy audits of large projects were added to the environmental assessment routines.

The popularity of the conservation causes also laid the ground for historic preservation, which has been simmering in art and design circles for a long time. Most of the provinces have passed legislation authorizing control of the use and development of designated buildings, and permitting the establishment of historic preservation districts in cities.

The public measures addressed to the conservation issues have broken new ground by extending the scope of regulations. New subjects have been brought under public domain, and reviews and permits have been introduced as control devices for regulating the designated matters, be they environment, energy or historic buildings.

6.7 Urban Form and Pattern of Land Use

Under this broad title fall those land disposition issues which, though recurring, take a new form in an era and demand fresh response. This was also the case in the 1970s and early 1980s. At the metropolitan scale there was the perennial concern about the urban form. A preference for clustered and sharply delineated central cities and satellites instead of the diffused and sprawling conurbations has become the yardstick by which urban forms are judged. The concern that underlined the Canadian urban planning practice in the 1970s was the dissatisfaction with the

urban fringe. Issues of strip development, the diffusion of bungalows in the countryside, excessive service demands arising from inefficient forms of development, and despoiling of amenities dominated the regional planning agenda. While the peripheries were suffering problems of uncoordinated development, city centres were being transformed into highrise fortresses of condos and offices. Neighbourhoods were gentrified, and low income housing squeezed out.

At the neighbourhood level the battle lines were continually drawn, pitching residents against group homes, public housing and condominiums. Institutionalization of the city participation raised the level of public debate and gave a new edge to neighbours' concerns. These issues of the 1970s and early 1980s brought forth a series of public and private responses which cumulatively have resulted in the recognition of a new set of externalities arising from land disposition decisions.

By instituting "vista corridors" to ensure visibility and dominance of the citadel on the city's skyline, Halifax added a new layer of public interest in private land use. Ontario's policies to promote energy efficient patterns of land use has brought access to sunlight within the scope of property rights. The development of False Creek as a federal/provincial project broke new ground by rejuvenating leasehold as a form of tenure, and by establishing income mix as a social amenity. The site plan review, discretionary zoning, and density transfer are examples of public measures which have broken new ground in rights to use and profit, and have redefined land as the bundle of rights.

The foregoing account should have provided an overview of the issues and responses pertaining to the disposition of urban land during the 1970s. The question is what are the implications of these events for the tenurial system.

7.0 RECENT TRENDS IN THE URBAN LAND TENURE

Doebele rightly maintains that "what happens to a piece of urban land is a product of three basic forces: the market, land use controls, and form of tenure."[33] It might be added that these forces not only affect land but also they modify each other. In the 1970s and early 1980s, the Canadian urban land market and the system of land use controls underwent notable changes which, in turn, revised the rights and obligations of owners and other actors (regulatory agencies, mortgages, buyers, etc.). Reconstitution of tenurial rights and obligations was not the intended objective of changes introduced in land use controls, or in the market operations. It is a by-product of the public and private actions in the 1970s. One piece of evidence about the extent to which the tenurial rights have been affected is the Canadian Real Estate Association's position on property rights. Through its yearly Property Rights Week and publications such as Losing Ground, it has begun to draw public attention to the changes that property rights have recently undergone.[34] The analytical question, then, is: what is the main thrust of the tenurial changes that have come about since 1970. In contemplating the answer to this question, four main themes stand out.

7.1 Enlargement of the Scope of Public Interest in the Disposition of Land

In earlier sections of this report, measures taken in the 1970s to conserve land and environmental resources have been enumerated. Taken together these measures constitute a major thrust towards extending the scope of public involvement in decisions about land disposition. First, through these measures the land use controls have been extended to the countryside which, by and large, had remained without such regulations. In the form of British Columbia's ALR's or Alberta's RDA's, zoning has been applied to agricultural areas, river estuaries and drainage districts. Secondly, these are not statutory zones prescribing uses for an area and thus delineating an owner's

sphere of action. Usually these measures require case by case review of ongoing activities (emission standards, agricultural practices, etc.) and bring in development permits as instruments of regulation. In this approach, public bodies become directly involved in operational decisions. Thirdly, provincial restrictions on non-resident owners are examples of direct public intervention in actual ownership of land. Fourthly, the costs of sprawl[35] thesis and the public concern with property taxes and local expenditures have brought forth new financial and administrative practices such as "development impost," lot levy, "community improvement assessment," "open space dedication," "site plan review," "energy audit," etc. The enactment of these practices implies an acceptance that social, economic and aesthetic externalities of land use are legitimate public concerns.

The sphere of public interest in land use has been extended. A number of previously unaccounted externalities have been internalized in land disposition decisions. Public bodies have become active partners (not just regulators) in land disposition. This approach has been called Growth management and, in Frieden's words (about parallel American situations), it has put in place "a variety of new laws, permit requirements, and review procedures for land development and housing construction."[36] It has ushered in an era of permit explosion.

Not only has the domain of public interest expanded but also a new mode of public involvement in decisions about land disposition has been forged. The new measures are generally enforced through highly individualized reviews and negotiations. One developer may be required to plant trees as visual barriers while his neighbour has to deed an easement for an underground passageway into a subway station; so variables can be the outcome of site plan review processes. This change in the mode of decision-making has affected the land tenure. This issue will be taken up as a separate theme in the next section.

From the above narrative it should not be inferred that the tenurial changes arising from various provincial legislations were deliberate and that they have uniformly affected the whole country. They were not intended, at least not acknowledgeably, to restructure the tenure. But given the powers of legislatures in Canada, they have not been judicially overruled to any degree. They have been frequently amended in response to situational exigencies and political pressures. The B.C. Land Commission has been practically disbanded as a matter of political choice, and not on the grounds of unconstitutionality or indefensible use of police powers. About eight cases were brought to the courts to challenge various provisions or decisions of the B.C. Commission, but no one pleaded the unconstitutionality of the Act. The P.E.I. Act against foreign owners was unsuccessfully challenged by two Americans.[37] The point illustrated by these examples is that in Canada, legislatures have wide powers to redefine land tenure, and they have exercised them in dealing with immediate resource issues.

7.2 The 'Process' Redefines the 'Substance' of Land

A decision about the use, division or sale of land was never entirely a matter of an owner's will or whim. There were always communal restraints and obligations of neighbourliness which limited an owner's field of action. In modern times, a community's interest in the disposition of land is secured in a number of ways -- regulations, taxation, capital works, expropriation and police powers -- but perhaps the single most significant instrument of expressing public interest is the land use control system. Through zoning, subdivision regulations and the master plan, a community lays down the rules which define what and how an owner can or cannot do with his land.

The planning systems established by provinces after World War II operate by prescribing some uses which an owner can choose to install or not install almost as a matter of right. They define an owner's field of action. The distinguishing feature of these systems is that within the

confines of statutory presumptions an owner has full power to decide.

The new regulatory thrust arising from the post-1970 legislations consists of a laying down of broad objectives and policies which are applied with considerable latitude and after extensive negotiations with owners on a case by case basis. A permit from the regulatory authority is the instrument of enforcement. This is the system that underlies many new urban planning practices and most of the conversational measures. A significant feature of this system is that it turns decisions about land disposition into a process of negotiation and bargaining involving numerous bodies and actors. An owner now is only one -- albeit a significant one -- of many actors whose interests have to be reconciled.

The evolution of the mode of decision-making from a statutorily defined "field of action" to an "individualized negotiational process" has direct bearing on the tenurial system. Not only do numerous actors become involved in decisions about land but also the efficiency of the decision process itself becomes a factor in the exercise of property rights. The time required to negotiate approvals, the probability of a favourable outcome, the procedural requirements and the requisite knowledge to resolve technical issues become determinants of the enjoyment of property rights. In this framework the process determines the substance of a decision. As the process becomes complex and indeterminate the expectations associated with tenurial rights are correspondingly revised.

The property rights ultimately are the decision-making authority, as Denman rightly maintains.[38] As the decision-making process changes, the property rights are effectively reconstituted. This is a form of functional land reform. The permit explosion and the negotiational approach functionally reorder the rights to use, profit, and even carry on (some) existing operations.

The questions of delays, uncertainty, "ad hocism" and complexity of the public approval processes that the development industry continually bring up are symptoms of the underlying tenurial change.[39] As a western real estate executive said, "heritage and discretionary zoning make one feel as if others have the power to determine what you can do with your property." On the other hand the planning director of a major city maintains that "the use of land is a potential and not a right, which one only owns in conjunciton with public decisions."

That the process has affected the "substance" of property rights brings into play consideration of the efficiency of the process. Denman may have exaggerated the ills of multiple actors[40] in land disposition, but undoubtedly the more complex and long drawn out the process becomes, the more diffused will be the property rights. No matter who exercises ownership rights, the question is how are they acted upon and with what degree of accountability, efficiency and fairness. This is the agenda for Canadian land reforms.

7.3 Carving "Ownership" in Space

Land as real property has been undergoing subtle changes as a result of new market practices and public policies. In response to the shifting housing needs and increasing costs of urban services, a number of innovative tenurial arrangements have been devised in both the public and private sectors. The primary thrust of these innovations is to reduce the component of "earth surface" in the base of land and increase reliance on "air space" as the substance of land. These shifts have increasingly made land an issue of claims and rights.

Land ownership is not necessarily the control of a piece of the earth. Frequently it has been combined with the right to use, occupy, control and dispose of a layer of space. While the technology to build highrises made

this possible, the tenurial innovations such as co-operatives, condominiums, etc. have generated the notion that land can float above the ground.

The concept of owning part of a building may or may not be traced to the Roman empire, but it certainly has been around in Canada. In 1908 Justice Davies upheld the title to "a set of rooms or a flat not resting directly on soil."[41] Apartment buildings made this practice quite common. A co-operative is one form of tenure in apartments. It is essentially a form of joint ownership in which an individual is a shareholder in a corporation bearing the title of the building as well as land. It has all the restrictions of joint ownership. A condominium individualizes titles by allowing units to be owned in fee simple, and an undivided interest in the ground, hallways, stairs and other common elements. Highrise condominiums confer upon an owner a title to a layer of space combined with a share in a corporation responsible for the ground, hallways, etc. The condominium concept has been extended from vertically divided layers of "land" to horizontally carved out lots (as in clustered houses) and from residential to industrial and commercial buildings.

The condominium is an evolved form of the air-right ownership which has been registerable in British Columbia and Alberta. There have been numerous examples of trading air rights in these provinces. An example is the shopping arcades in Calgary, which have been built on air-spaces bought over streets.

Density transfers is a new concept forged by combining the developmental potential (density) conferred by zoning and planning statutes with the transferable air rights.[42] The concept consists of transferring an allowable density from one site to another. Density transfers have been very satisfactorily used to preserve a church in downtown Vancouver whose developmental potential was allowed to be transferred to another site. Similar transfers have taken place in New York and Toronto. In the United

States the idea of density transfers has taken the form of marketable development rights, i.e. Transfer of Development Rights (TDR). There are numerous examples of the use of TDR techniques in the U.S.A.

These concepts and practices illustrate the evolving definition of land. In effect, land has been unanchored from the ground, and land has become a claim to control a layer of space. It is also a negotiable claim and one that confers the right to occupy.

The subdivision of space into lots requires a well developed institutional structure and is rooted in the existence of a common access and ground base. This form of private property has parallelled the communalizing of access and service systems. Individual and the collective properties have been combined in modern real estate.

7.4 Carving the Land in Time

In search of economical ways of producing recreational properties, moderate income homes and residences for the elderly, the real estate industry and financial institutions have designed imaginative titles. By limiting ownership to a specified, though sometimes indeterminate, period of time, the financial costs have been reduced. This inventive thrust has led to further modifications of the substance of land.

Historically, leaseholds are estates carved in time. A leasehold condominium created an ownership of a layer of space for a specified time. The recent (late 1970s) introduction of registerable title of "Time-Sharing" properties carries this notion a step further. For example, an individual can own an apartment for one month each year. Time-sharing units require "a specific legislative framework in this instance to give an ownership interest for a limited period of time."[43] Although such legislative frameworks do not exist in Canada, developers have gotten around this obstacle

by selling or leasing ownership interest in a condominium to multiple purchasers.[44]

Another interesting proposal, particularly for elderly homeowners is Reverse Annuity Mortgages. A Reverse Mortgage "entails the mortgaging one's house to acquire future stream of income up till one occupies the house."[45] In this case the mortgagee acquires a future possession while allowing the mortgagor to maintain the present use. There are other examples of financial institutions becoming partners in property, such as in the case of Equity Sharing mortgage.

As property interests have been divided into space and in time, the solidity of land has been diluted. The "incorporeal" elements have gained prominence as constituent elements of land. As the "nature" of land undergoes change, its tenureal forms change correspondingly. For example, the owner of a condominium apartment on the seventh floor of a building cannot even in passing suggest that "my home is my castle and I can do anything with it." As a private property, a condominium is inextricably bound with common property and enjoyment of the property is subject to a strict behaviour code. The new mortgages or TDR's are turning financial institutions and public authorities into partners with an owner. Incidentally, such arrangements also assume a stable political order and a sophisticated market institution.

Such changes coincide with the evolutionary trends of the post-industrial society where assets have increasingly taken the form of stocks, claims, notes and other paper wealth. It is no wonder that land is steadily becoming a "patent" entitling the owner to control a prescribed space for a specific time. This urban land reform has proceeded without public acknowledgement in Canada.

8.0 EMERGING LAND TENURE

There are two overriding themes in land related events since 1970. The first is the external factors of individual land disposition decisions are being internalized. The post-war planning and zoning measures addressed external neighbourhood factors. The environmental and growth management measures of the 1970s deal with more pervasive (regional and national) decisional interdependencies. It is almost a cliche now that land should be viewed as a resource and not a commodity implying an enhanced social responsibility in its disposition.[46]

Secondly, the social meaning of land is being revised. Not only is land taking new forms (TDRs, condominiums), but also its "man-made" component is proportionately increasing. Increasingly the enjoyment and use of land depends on the existence of physical infrastructure, social services and institutional framework. Without these common elements there would not be an urban lot. Thus the private and the communal dimensions of the property are increasingly inseparable.

These developments have affected the property rights and thus redefined land tenure.

The Right to Use. Various public initiatives of the 1970s have turned this power of a property owner into a licence to be obtained from a public authority. Public control of land use has been extended areally (now even agricultural lands are effectively zoned) as well as in subject matter. The environmental, energy and public cost considerations have been added to the public evaluation criteria. The new measures are individualizing the public land use controls and are promoting case by case negotiations and trade-offs. An owner's "field of decision" has been rendered indeterminate, which is not the case with statutory zoning.

The indeterminacy of use affects land values and the right to profit. Public authorities have become co-decision makers in matters of land use. so have other institutional actors such as banks, insurance companies and private corporations. The power of property has been diffused among a host of actors, in which the owner is becoming primarily an initiator and co-ordinator of the decision process.

The Right to Alienate and Pass-By Succession. The provincial legislations which restrict the ownership of land by foreigners, and even by Canadians of other provinces, signify a new public initiative. They curtail a land owner's opportunities to sell and, it was discovered in Saskatchewan, even to pass-by in succession. (Children residing outside the province can inherit farm land initially up to a five-year period within which they have to become residents. Otherwise the land has to be sold to a resident.) By prescribing who can or cannot own land and how much, the provinces have restricted these rights.

The Right to Divide and Assimilate. These are powers to alter the configuration of a proprietary unit by adding or dividing land. Since 1970, the criteria for granting severances have been tightened, the planning powers have been extended to "ration" the creation of new lots (cases in point are local policies which lay down that a farmer can have "one residential lot for each child" or for "every fifty acres," and so on). Also, the imposts or levies have been instituted by some localities for land division. In addition to these provisions, the requirements for permits in designated areas (such as the Fraser River valley or Niagara Escarpment) and the prerequisites of obtaining mortgages or fire insurance have further revised the owner's powers to alter lot configurations. Once again, the decision-making has been spread out among a number of agencies and actors, both public and private.

The Right to Profit. The right to profit has never been an undisputed right. Over the years there have been more public debates about land rent,

windfall gains, speculation and other issues bearing on the "right to profit" than on any other aspect of the land question. From Ricardo to Marx and Henry George to Edwin Mills, theorists of both the right and the left stripes have passionately taken opposing positions on the justification of owners profiting from land which is a gift of nature, and whose value is a social endowment. In practice this right has also been restrained by taxes and the use of executive authority.

In post-World War II Canada, the property, the income and the capital gains taxes have so evolved that real estate profits are shared with the government. Simultaneous expansion of planning and public spending power (installation of services, etc., and thus creation of high land values) have indirectly affected the financial rewards of owners. It is no surprise that the issue of betterment and compensation have continually dogged land use planning. For contemporary cities, the land reform has been long thought to consist of mechanisms for neutralizing windfalls and wipeouts (of land values) arising from social investments and public action. The HABITAT Conference (1976) of the United Nations recommended in unambiguous terms that "the unearned increment resulting from the rise in land values resulting from change in use of land, from public investment...must be subject to recapture by public bodies."[47] The point of delving into the use and value aspects of land is that the right to profit has always been constrained by the public awareness about the unearned component of the returns from land.

In the post-1970 era, the extension of public involvement in land use decisions has affected this right all the more. The new processes make the right to profit more dependent upon the discretion of public officials.[48]

Other notable developments of the 1970s are forceful expressions of public interest in land prices through public inquiries, the institution of rent controls, and land speculation taxes. Though these measures were,

by and large, ineffective in restraining land prices, their enactment underscores public intentions and powers to regulate profits. Obviously a notion of normal profit has emerged. Any large scale transgression of this standard is considered to be beyond the right to profit.

A review of changes in property rights tends to take on the tone of a nostalgic lament. Such a sentiment is inevitable because one is comparing present restraints and redefinitions with beliefs or concepts from the past. Revisions are "necessary" in view of the emerging public concerns and evolving nature of the urban land. Basically these are piecemeal and halting attempts to accommodate the externalities of urban land and the demands of a post-industrial economy. These attempts may not have been very effective, but they represent current social thinking and expectations in Canada.

8.1 Common Property

Another theme emerging from the events of the 1970s is a preliminary crystallization of rights to common property which include the following land related rights:

a) Right to clean air and water;

b) Right to sunlight;

c) Right to healthful environment (free from nuclear, auditory, chemical, and physical hazards);

d) Right to harmonious communities;

e) Right to decent shelter

f) Right of access to natural amenities, i.e. waterfronts, mountains, open spaces, etc.

The natural elements which were abundant and free in agrarian economies have become scarce and valuable in megalopolitan societies. Unless consciously

protected, they can be appropriated by a few and irreversibly damaged for the rest. Yet they are essential for healthful living. They are often indivisible and constitute collective goods, if not entirely by their nature, then by social choice. They are the constituent elements of the common property. People's demands for this property are emerging with increasing awareness of the finiteness of natural resources. Access to common property is being claimed as a right associated with being members of a community and occupants of land. The enjoyment to be derived from one piece of land depends on the right of not being excluded from common property and on its effective management. What Macpherson says about property "as the individual right not to be excluded from the use or benefit of the whole society"[49] can be more readily applied to natural elements. It is a further evidence of the intertwining of the private and public dimensions of land disposition that, to enjoy property rights in one's land, one must be assured of rights to common property.

9.0 THE UNFINISHED AGENDA OF URBAN LAND REFORMS IN CANADA

The tenurial changes described have occurred without a purposive design. They are the result of a multitude of public and private actions. The "revisions" of land use controls, in scope as well as in enforcement process, have been the prying instruments of tenurial reforms. Land ownership legislations, tax policies, public investments and financing innovations have also contributed to the modification of real property as a concept. The primacy of land use controls as a tenurial element means that the unresolved issues of regulatory processes will continue to be on the forefront of land reform agendas. Briefly the question of the appropriateness, efficiency and accountability of the land use control processes are also the issues in urban land reforms.

The public sector and financial institutions have become active partners in land use decisions. This interjection of new actors in land

disposition decisions should not be viewed as an ideological issue alone. It is an economical and physical necessity arising from the "nature" of the urban land. If most of the present regulations were to be rescinded today, they would have to be reinvented on popular demand to ensure everybody's access to the common goods -- air, water, sunshine, land, etc. But the involvement of numerous actors in land use decisions does not have to take the present form. The present processes are only means to social ends. Better ones can be devised.

Undoubtedly the cumulative effects of a myriad of regulations and discretionary powers is that it took on the average almost 40 months to get approval of a subdivision in Mississauga, Ontario, during the period 1975-78.[50] While the negotiations, flexibility, site sensitivity and bargaining (for public improvements) as well as environmental and energy conserving designs are laudable objectives, the process through which they are implemented has yielded a high degree of uncertainty (about possible use) for land owners, and seems to invest public officials with excessive discretionary powers. It does not have to be so. The recent enactment of new planning acts in various provinces addresses these issues to some degree, but these attempts essentially are limited to "fine tuning" the process.

A Land Reform would call for clarifying the rights and obligations of owners as well as other actors. Such an initiative could take the form of a public examination on a national scale of the responsibilities, rights and obligations of various actors and defining the scope of new common property rights. A new charter of property rights that acknowledges and streamlines the contemporary tenurial changes will consolidate the piecemeal reforms of the past two decades.

Any attempt to entrench property rights in the Charter of Rights without spelling out their scope will precipitate judicial appeals and costly court

interventions, as many provinces suspect. Formalizing the de facto property rights and incorporating rights to common property is the agenda for future land reforms.

NOTES

1. Darin-Drabkin estimates that in western cities about 125 m^2 of land per person is used for residences, while 118 m^2 per person is taken up by roads, green spaces and public services. Almost a ratio of 1 : 1 in residential and public land requirements. Haim Darin-Drabkin, Land Policy and Urban Growth (New York: Pergamon Press, 1977), 40, Table 2.9.

2. Raleigh Barlowe, Land Resource Economics (Englewood Cliffs: Prentice Hall, 1972), 8.

3. Ibid., 413.

4. D.R. Denman, The Place of Property (Berkhamsted: Geographical Publications, 1978), 102-5.

5. Charles C. Geisler and Franke Popper, Land Reform, American Style (New Jersey: Rowman and Allanheld, 1984), 4.

6. Ibid., 7.

7. Denman, Place of Property, 28.

8. V. Kruse, The Right of Property (Oxford: Oxford University Press, 1939).

9. Denman paraphrases Kruse in terms of these five powers. Denman, Place of Property, 29-34.

10. A.H. Oosterhoff, Losing Ground: The Erosion of Property Rights in Ontario (Toronto: The Ontario Real Estate Association, 1979), 11.

11. P.J. Dalton, Land Law (London: Oyez Publishing, 1972), 1.

12. A. Smyth and D. Soberman, Law and Business Administration in Canada (Toronto: Prentice Hall, 1983), 552-577.

13. Ibid., 556.

14. For a quick overview of the constitutional powers to regulate land and their institutionalization, see the introductory chapter in William T. Perks and Ira Robinson, eds., Urban and Regional Planning in a Federal State (New York: McGraw-Hill, 1979), 1-10.

15. In discussing the restrictions on owners' rights, Hamilton and Baxter suggest that an owner of a piece of land "is functionally more akin to a long term tenant..." (emphasis provided). Hamilton and Baxter in Lawrence B. Smith and Michael Walker, eds., Public Property? The Habitat Debate Continued (Vancouver: The Fraser Institute, 1977), 85.

16. The post-war land planning framework was laid by the following provincial acts, all of which were enacted in the 1950s and early 1960s: British Columbia, Municipal Act, 1960; Alberta, The Town and Rural Planning Act, 1955; Saskatchewan, Community Planning Act, 1957; Manitoba, Town Planning Act, 1954; Ontario, The Planning Act, 1960; Quebec, The Cities and Towns Act, 1960; P.E.I., The Town Planning Act, 1951; New Brunswick, The Community Planning Act, 1960-61; Nova Scotia, The Town Planning Act, 1954; Newfoundland, The Urban and Rural Planning Act, 1953.

17. Dunham in Murray Stewart, ed., The City (Harmondsworth: Penguin, 1972), 284.

18. Science Council of Canada, Population, Technology and Land Use (Ottawa: Queen's Printer, 1975), 304.

19. William Reilly, ed., The Use of Land: A Citizen's Policy Guide to Urban Growth (New York: Thomas Y. Crowell, 1973), 17.

20. Federal/Provincial Task Force on the Supply and Price of Serviced Residential Land, Down to Earth, Vol. 1 (Ottawa: Queen's Printer, 1978), 7.

21. Ibid., Table 2-A, 7.

22. Spurr estimated that 120-140 large firms accounted for 75 per cent of metropolitan lots production during the early 1970s in Canada. Undoubtedly large firms dominated the metropolitan land markets, but, as he says, it was "a deep-seated structural situation, reinforced by consumer needs for housing, environmental needs, urban planning, and development financing." Peter Spurr, Land and Urban Development (Toronto, James Lorimer, 1976), 397.

23. Federal/Provincial Task Force, Vol. 1, 72.

24. Ontario Advisory Task Force on Housing, The Housing Production Process in Ontario (Toronto: The Ontario Advisory Committee, 1973), 16.

25. Ontario Planning Act Review Committee, Report of the Planning Act Review Committee (Toronto, 1977), x.

26. Environment Canada, Canada's Special Resource Lands (Ottawa: Lands Directorate, Environment Canada, 1979), 8.

27. Ibid., 17.

28. Lapping and Forster quote Lord Durham as suggesting that "alien ownership" has been historically a source of discontent in P.E.I. Lord Durham is quoted as saying, "Past and present disorders are but the sad result of that fatal error which stifled its prosperity in the very cradle of its existence, by giving up the whole of the Island to a handful of distant proprietors." Lapping and Forster in Geisler and Popper, Land Reform, 248.

29. Masson Gaffney, "Social and Economic Impacts of Foreign Investment in the United States Land," Natural Resources Journal (July 1977): 382-89.

30. Gaffney, "Social and Economic Impacts," 378.

31. Marge Misekand Mark B. Lapping, "Making Land Policy: P.E.I.'s Attempts to Control Individual and Corporate Land Ownership," Plan Canada,24: 2 (September).

32. Environmental Assessment of Canada, 1982 Summary of Current Practice (Ottawa: Canadian Council of Resources and Environment Ministers, 1982), 11.

33. Doebele in Harold B. Dunkerley, ed., Urban Land Policy (New York: Oxford University Press, 1983), 67.

34. There are numerous expressions of concern about the "erosion" of property rights. Individuals confronting environmental heritage and planning regulations raise the question of "public" officials deciding about their properties. The Fraser Institute in Vancouver has published a number of studies on the loss of property rights. See, for example, Smith and Walker, Public Property. The Canadian Real Estate Association as well as the Urban Development Institute are increasingly vocal about property rights.

35. Low density and scattered development of houses and commercial establishments strung out along highways is called "sprawl." This pattern of development is regarded as wasteful of land, and is expensive to provide public utilities due to long and low intensity service networks. This is the thesis of the "cost of sprawl." It has been documented in a nationwide study of the U.S. Real Estate Corporation (1974).

36. Bernard Frieden, "The New Regulation Comes to Suburbia," Public Interest, 55 (July 1979): 16.

37. The decisions of the B.C. Land Commission were challenged only on procedural grounds, and on the scope of its authority. The P.E.I. Real Property Act was unsuccessfully challenged on constitutional grounds. For the latter, see Geisler and Popper, Land Reform, 252-53.

38. Denman, Place of Property, 37-38.

39. The issue of regulatory overburden was brought before the Federal/ Provincial Task Force (1978). It continues to be a "complaint" of the development and real estate industries. For example, in 1983 Western Management Consultants prepared a report about permit processing in the Planning Department and Development Permit Board. The consultants list 15 complaints of developers; among them are "uncertainty," "lengthy process," "subjective judgement of officials," etc. The most common concern is "uncertainty of the city's requirements," which makes it difficult for developers to "establish development plans." Furthermore, development proposals were said to be "approved or rejected on the basis of, among other things, aesthetics and architectural details -- issues where they (the city staff) were perceived to have neither qualifications nor the mandate." See City of Vancouver Memorandum, "Consultants' Report in Development Permit Process," (Mimeographed) March 28, 1984.

40. Denman enunciates the first law of proprietary magnitude as "the degree of competence with which the power of decision-making inherent in property power is used moves in inverse ratio to the number of joint owners," Denman, Place of Property, 40.

41. Barry Reiter, et al., Real Estate Law (Toronto: Emond Montgomery, 1982), 572.

42. Density Transfer is the Canadian term for the Transfer of Development Rights (TDR).

43. Reiter et al., Real Estate Law, 585.

44. Ibid., 586.

45. The idea of Reverse Annuity Mortgages has been explored by H. Bartel and M. Daly, "Reverse Annuity Mortgages," Canadian Public Policy, 4 (Autumn 1980).

46. Land presents a dilemma for economic analysts. It is a "resource" in the sense of being a "factor of production." It is finite and irreplaceable. But it is also a "commodity" which is speculated upon. The tension between the two aspects of land has continually preoccupied theorists. In contemporary times, the population explosion, food crises, and environmental limitations are once again bringing forth the notion that land should be treated as a non-renewable natural resource.

47. Habitat's recommendations for National Action on Land were approved at the U.N. Conference on Human Settlements (1976) at Vancouver. This quote is from the recommendation.

48. See note 35 above.

49. C.B. Macpherson, Property: Mainstream and Critical Positions (Toronto: University of Toronto Press, 1978), 206.

50. Stuart B. Proudfoot, "The Politics of Approval: Regulating Land Use on the Urban Fringe," Canadian Public Policy,7 (Spring 1981): 286, Table 1.

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